

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9015 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? :
A copy of this judgment be sent to the Collector
of Central Excise, Bharuch, Ankleshwar.

MAN INDUSTRIES (INDIA) LTD

Versus

STATE OF GUJARAT

Appearance:

Mr.Yatin Oza with MR DC DAVE for Petitioner
Mr.K.T. Dave, AGP for Respondent No.1
Mr.S.B.Vakil with Mr.A.M.Kapadia for Respondent No.2
Mr.P.M.Thakkar with MR.A.S. VAKIL for Respondent No. 3

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: September 6 & 7, 2000

ORAL JUDGEMENT

Rule. Mr.Kapadia waives service of rule for
respondent No.2. Mr.A.S.Vakil waives service of rule for
respondent No.3. With the consent of learned counsel for
parties, the petition has been finally heard and is being

disposed of by this judgment.

2. In this petition under Article 226 of the Constitution, the petitioner has challenged the letter of intent dated 17.8.2000 issued by the respondent No.2-Gujarat State Petronet Ltd (hereinafter referred to as "the Second respondent" or "the Petronet Ltd") in favour of respondent No.3-Welspun Gujarat Sthal Rohren Ltd. (hereinafter referred to as "the Welspun") in respect of item Nos 1.1 and 3.1 of API 5L pipes of 18" and 24' size as per the tender specifications for Ankleshwar (Amboli)-Dahej gas pipeline.

The tenders were called for by inviting 10 parties including the present petitioner and Welspun Ltd. The tenderers were invited for the following items:

Item Description	Quantity
Pipe in accordance with: "Particular technical specification 87290/740/PTS/901: Specification for coated line pipes.	
"Pipes Sizes: 18" and 24" API 5L X 60 Longitudinal welded	
1 Line pipe 457 x 9.5 mm with coating 5000 and with internal lining.	
2. Line pipe 610 x 17.5 mm with coating 6000 and with internal lining.	
3. Line pipe 610 x 11.9 mm with coating 32500 and with internal lining.	

Out of the aforesaid parties six parties submitted their bids. The bids were invited in two parts, i.e. technical bids and price bids. The technical bids of all the parties were opened on 19.6.2000. On 21.6.2000 the second respondent addressed letter to the petitioner and other bidders suggesting clarifications for technical aspects and also inviting revised price bids, if any. The letter dated 21.6.2000 addressed to the petitioner is at annexure "1" to the reply affidavit on page 63 relevant part of which reads as under:

"You are advised to indicate the quality assurance and testing procedures to be adopted for the raw materials as well as finished product/coatings. Also indicate whether the coating shall be carried out using your own internal resources or from outside source. In either case indicate the available resources for application and testing.

We have gone through the Techno-commercial part of your offer and on preliminary scrutiny we require your clarification/confirmation as noted in the attached annexure.

In case there is any price implication on account of any confirmation/clarification or withdrawal of deviation taken in the original offer, you may submit revised price bid in the format specified in the tender document. Please note that such revised prices should be accompanied by note on justification for revision in the price on account of each and every item. Such note of justification and the revised price offer as above shall be submitted in sealed cover. Revised offer as above should reach our office by 18.10 hours IST on 26.6.2000.

Please note that supporting documents, in case any exemption from applicable taxes/duties etc have been claimed, should also be submitted along with. During the evaluation process, if there is a high probability of claimed exemption with respect to any tax/duty not becoming available in the opinion of GSPL bid price will be appropriately loaded."

The petitioner offered the clarification and also submitted his revised price bid on 30.6.2000(annexure "B" to the petition). On 1.7.2000 the second respondent addressed another letter to the petitioner soliciting further clarifications on some technical aspects relevant part of which reads as under:

"Please confirm if cold expansion of pipes is included. This is shown in the flow chart for the pipe manufacturing process submitted by you."

The petitioner replied to the aforesaid letter on

4.7.2000(annexure "3" to the affidavit reply) inter alia stating as under:

"Confirm that we will perform Cold expansion of pipes".

On 8.7.2000 the second respondent sent another letter (annexure "4" to the affidavit reply on page 78), inter alia, requiring as under:

"1. Confirmation that your bid price is inclusive of cold expansion process to be performed on line pipes.

3. You must specify the location/party wherefrom coating of line pipes is proposed to be arranged".

The petitioner replied to the same on 12.7.2000 (annexure "5" on page 69) confirming that the petitioner's bid price is inclusive of cold expansion process to be performed on pipes, and that coating of pipes will be done at petitioner's plant at Pithapur. On 19.7.2000 the petitioner was informed that the price bid would be opened on 24.7.2000.

On 22.7.2000 the technical consultant appointed by the second respondent, i.e. Tractebel Engineers & Constructors visited the manufacturing plant of the petitioner at Pithapur near Indore in Madhya Pradesh. On 23.7.2000 the Technical Consultant wrote a letter (annexure "D" page 38) seeking following information:

"As requested during our visit please arrange to send us copies of the purchase orders placed by you for internal and external coating machineries and cold expansion machinery and also furnish shipping related documents. Please inform us the schedules of delivery at your works, commissioning and trial runs separately for the coating plant and the cold expansion machineries. Please also confirm whether the machineries being procured by you are new or second hand".

The petitioner submitted their response (annexure "E" at page 39") which reads as under:

"That we are in a position to supply the coated pipes from our own facilities within the delivery schedule of GSPL tender. Our facilities will be ready in next 30 to 45 days time.

"Further, we undertake, that in the event of delay in commission of our facilities, for whatever reasons, we shall have the pipes coated within India through an established and approved coating plant who would meet the technical parameters for coating and in this eventuality also, we will honour the delivery schedule of the GSPL tender".

On 24.7.2000 the technical consultant forwarded the clarifications from the petitioner to the second respondent and another party, namely, SAW Pipes. The technical consultant made the following observations regarding coating plant to be installed in the petitioner's factory:

"However, in case of MAN industries, our team was informed that the Coating Plant is likely to be shipped from Europe in the near future. Taking into account the shipping time, customs clearance and inland transport, commissioning and trial runs, the entire process may take much more time. 30-45 days stated by the party for plant readiness is, therefore, highly optimistic".

On 1.8.2000 the petitioner sent another letter (annexure "E" page 41) to the technical consultant stating that the cold expander has reached Indian port and has also been custom cleared and currently is enroute the petitioner's works at Pithampur, where it will reach on or before 4.8.2000 and that the trial production should be taken by the 4th week of August 2000. As regards the coating facility, the petitioner made following statement in the letter:

"We have already apprised and shown you the relevant papers and we once again confirm that the coating plant would be available at our works in next 30-45 days time. However, currently as a matter of abundant precaution, we are once again ready to show you the documents for your

reference, but we would like to be excused in submitting those documents, as it may hit our interest adversely, if anybody else other than Tractebel and GSPCL (second respondent) have a look at them.

You will appreciate our contention considering the cut throat competition currently existing in the Indian business market. However, should you require any additional information, we shall be too pleased to submit the same for your consideration and evaluation".

On 7.8.2000 the petitioners sent another letter to the technical consultant stating that the petitioner had already started installation and commissioning of cold expander and that the trial run shall be completed by the end of August 2000. As regards the coating facilities the petitioner stated as under:

"Kindly note that the entire plant and machinery which also is brand new shall be available at our works in next 30-35 days time. Thereafter, we shall require around 30 days time to complete the installation, commissioning and successful trial runs.

Thus, it will not be out of place to mention that our facilities shall be ready for commercial production by the end October 2000.

Further, we also wish to draw your attention to our letter dated 24th July where we have given you an undertaking in the event we envisage any delay in achieving our deadline towards commissioning our coating facility, we shall have the pipes coated within India through an established and approved coating plant, who would also meet the technical parameters for coating as stipulated in the tender.

Now, considering that we already have the expander in place and our coating facilities be ready by the end October 2000 we are all set and in a comfortable position to meet the delivery requirement of GSPL tender".

On 10.8.2000 the technical consultant submitted their report (annexure "7" page 72 & 73) to the second

respondent stating that after submitting technical comparison report dated 21.6.2000, the technical consultant sought clarifications and confirmation from five bidders including the petitioner. In view of the fact that the second respondent has heavily relied on the report dated 10.8.2000 of the technical consultant for passing the impugned resolution dated 11.8.2000 the relevant portion of the report is quoted in its entirety:-

"In addition to various technical queries, MAN industries was specifically asked (vide reference No. GSPL/2000, dated 21st June 2000) to clarify whether coating shall be carried out in house or through external sources. In either case they were asked to submit details on application and testing. MAN however, did not reply to the above query regarding source of coating. However, they submitted the coating procedure and QAP vide their letter No. NIL dated 26th June, 2000. Tractebel's techno-commercial observations dated 1st July 2000 on clarifications from bidders, recorded the fact that MAN had not responded to the query on coating plant.

GSPL and Tractebel decided (vide MOM of 1st/Second July, 2000) to seek a specific confirmation from MAN on the inclusion of cold expansion in the manufacturing process as shown in their flow chart submitted in their original offer. In their reply, vide letter No.MIL/IND.2K/0650 dated 4th July, 2000 MAN, however, mentioned that they will perform cold expansion of pipes.

Tractebel team visited the MAN factory on 22nd July 2000 to assess their capabilities as mentioned in the original offer. During the visit, it was however, noted that the cold expansion unit and coating plant are not existing in the factory. MAN assured that coating plant would be made available for commercial production within two months and cold expansion unit will be made available for commercial production within three weeks.

Tractebel vide letter No.TECPL/MAN/149 dated 23rd July 2000 sought from MAN the documentary evidence of having placed the orders for cold expansion as well as coating plant machineries.

MAN replied vide letter ND/44/2K/2009 dated 24th July 2000 indicating the time frame for coating plant as 30-45 days for supply of coated pipes. However, MAN also mentioned in their letter that in case of delay in commissioning of coating plant, coating shall be carried out through an external agency but failed to name the agency which was the requirement as per GSPL letter dated 21st June 2000. This issue was discussed earlier with MAN but they could not provide any concrete details of their arrangements for outsourcing coating activities.

Subsequently, MAN sent letters vide ND/44/2K/2025 dated 1st August and ND/44/2K/2037 dated 7th August 2000, indicating a new schedule of about 65 days, i.e. by end October 2000 for installation, commissioning and trial runs of coating plant. For cold expander, MAN expected completion date for installation, commissioning and the trial runs as end August 2000.

Based on our assessment and reinforced by expert views from our Brussels office, we are of the view that these new plants, specially the coating plant would require minimum 203 months (post trial runs) to obtain consistent quality output. In addition, experience and trained skills are crucial in ensuring established quality production in a manufacturing plant specially where there is no previous experience existing.

Based on careful consideration of facts stated above and taking into account the situation that their coating plant being not available and the Cold Expander not yet commissioned, MAN industries can not be qualified for any further consideration in this tender at this stage".

Thereafter, on 11.8.2000 the Board of Directors of the second respondent passed the following resolution:

"Resolved that the evaluation shall be on itemwise basis as specified in the tender.

It is further resolved that M/s Man Industries be not considered any further for the purpose of placement of order in view of categorical recommendation of M/s Tractebel.

It is further resolved that the preferred (lowest) bidders status be given to M/s Welspun in two categories (i.e. item No.1.1 and 3.1) and M/s Saw pipe in one category (i.e. No.2.1) and authorised Shri Sanjay Gupta, Director to further discuss and negotiate with the preferred bidders and finalise for the placement of order for supply of the line pipe.

It is further resolved that the efforts should be made to bring down the item wise rate to the extent possible".

Thereafter, the second respondent issued letter of intent dated 17.8.2000 (page 117) in respect of item Nos 1.1 and 3.1 at the rate of Rs.4292.10ps per diameter and Rs.6579.27ps per diameter respectively inclusive of Excise duty and also of customs duty if any. The Sales Tax not to be chargeable to the maximum extent, clauses regarding delivery period and liquidated damages are as under:

"2.Delivery period:

The delivery period shall be four months (120 days) from the date of LOI, ex-site of the entire quantity of the ordered linepipes. However, first delivery shall start earliest by 90 days after placing of LOI.

4.Liquidated Damages:

If the contractor fails to deliver the line pipes within the agreed delivery schedule GPSL will recover as ascertained and agreed liquidated damages and not by way of penalty a sum equivalent to 1% of the total value of the order for each week of delay or part thereof in supply subject to a maximum of 10% of the total value of the order. LD will be imposed, on the total value of the order unless 75% of the value ordered is supplied within the stipulated delivery period. Where 75% of the value ordered has been supplied within stipulated delivery period, LD will be imposed on Contract value of delayed supply(ies). However, where in judgment of GSPL, the supply of partial quantity does not fulfill the operating need, LD will be imposed on

full value of the supply order."

After receiving the letter of intent the Welspun submitted performance guarantee dated 18.8.2000 with bank guarantee for a sum of Rs.2,35,50,000/- being the amount of 10% of the contract value.

Along with acceptance letter dated 18.8.2000 the bank guarantee was validated upto 31.1.2002.

3. The present petition came to be filed on 22.8.2000 challenging the aforesaid letter of intent dated 17.8.2000. The second respondent appeared on caveat and the following order came to be passed on 22.8.2000:

"Notice returnable on 24.8.2000.

Mr.Vakil with Mr.Kapadia appearing for respondent No.2 on caveat waives service of notice.

Mr.Y.N.Oza prays for ad interim injunction.

No orders are passed for the present except that whatever steps the respondents take hereafter shall be subject to any further orders which may be passed in this petition."

4. Affidavits in reply have been filed on behalf of second respondent as well as on behalf of respondent No.3-Welspun Ltd. The petitioner has filed affidavit-in-rejoinder to said affidavits-in-reply. The affidavits-in-Surrejoinder have also been filed. The parties were permitted to complete their pleadings and with the consent of learned counsel for parties this petition has been taken up for final disposal and after hearing the learned counsel for parties at length, this petition is being disposed of by this judgment.

5. Mr.Yatin Oza with Mr.D.C.Dave, learned counsel for the petitioner have raised the following contentions:

5.1 The petitioner having fulfilled the terms and conditions of the tender notice including clauses 1.1 and 1.2 was fully eligible whereas the Welspun was not eligible and instead the second respondent has disqualified the petitioner and considered Welspun Ltd. as eligible party.

5.2 The petitioner has not been called for negotiations and the Welspun Ltd has been called for negotiations and thus the second respondent has acted arbitrarily in negotiating with the Welspun.

5.3 The second respondent and its technical consultant have taken a perverse view that the petitioner did not have cold expander facility when the petitioner had already informed that the cold expander had already reached the petitioner's factory on 7.8.2000 and the trial run was likely to be done by the end of August 2000.

5.4 The petitioner had made it clear that the petitioner was going to have coating facility and that the petitioner was in a position to apply coating on pipes to be manufactured by it in its own factory by the end of October, 2000 and in the alternative that the petitioner was going to get coating done by a well established agency within India, and that the petitioner was not in a position to disclose the name of such party/agency only because of cut-throat competition in the market and the petitioner was prepared to show the documents to show its preparedness for getting the coating work done by a well established agency.

5.5 Reliance has been placed on several decisions including (i) AIR 1979 SC 1628 (Ramana Dayaram Shetty vs The International Airport Authority of India Ltd and others) (ii) AIR 1996 SC 11 (Tata Cellular vs Union of India), (iii) AIR 2000 SC 801 = JT 2000(1) 481 (Air India Ltd vs Cochin International Airport Ltd and (iv) the decision of this court dated 20.7.2000 in Special Civil Application No.7763/200--S.Kumar Transport vs State of Gujarat.

6. On the other hand, Mr.S.B.Vakil with Mr.Kapadia for the second respondent have made the following submissions:

6.1 The petitioner did not have the cold expansion facility as well as coating plant in its own factory when the technical consultant visited the petitioner's factory on 22.7.2000 and therefore the technical consultant had submitted its report to the effect that the petitioner did not have these facilities with it and that therefore the petitioner was not in a position to supply the coated pipes manufactured with cold expander facility within the time schedule contemplated by the tender, and therefore, the petitioner was rightly excluded from consideration.

6.2 Once the petitioner went out of the picture in view of the aforesaid relevant facts, the petitioner has no right or locus to challenge the eligibility of Welspun Ltd and looking to the fact that the Welspun Ltd was an experienced company supplying such materials and considering the fact that the terms of tender required the party to have supplied similar pipes during last three years, the Welspun Ltd was eligible. In any view of the matter, the decision of the second respondent to consider the Welspun Ltd as eligible can not be said to be arbitrary or illegal. Reliance is placed on the decision of the Supreme Court in AIR 1990 SC 958 in M/s G.J.Fernandez vs State of Karnataka.

6.3 The petitioner did not have cold expansion facility when the technical consultant visited the petitioner's factory on 22.7.2000. It was noted that the cold expansion unit and coating plant were not existing in the factory and similarly the technical consultant had opined that even as per the petitioner's letters dated 1.8.2000 and 7.8.2000 the coating plant was to be installed and put to trial run by the end of October, 2000 and therefore there was full justification for excluding the petitioner from consideration when the second respondent was keen to get the coated pipes within four months from the date of issue of letter of intent for the purpose of transmitting the natural gas from Hazira Gas Field to Dahej for supply to Gujarat Alkalies and Chemicals Ltd (GACL) covering distance of about 45 Kms. If there is delay in laying down the pipeline the second respondent will be exposed to liability to pay damages of Rs.10 lacs per day to GACL.

6.4 Reliance is also placed on several decisions, i.e.

(1991) 1 SCC 492--Raunaq International Ltd vs
I.V.R. Construction Ltd

AIR 1990 MP 49--M/s Malca Constructions (India)
Pvt.Ltd vs The Madhya Pradesh Housing Board,
Bhopal

AIR 1990 SC 958 in M/s G.J.Fernandez vs State of
Karnataka

to contend that this Court would not sit in appeal over the decision of an authority in awarding a contract.

7. Mr.P.M.Thakkar with Mr.A.S.Vakil, learned counsel for Welspun Ltd have adopted the aforesaid arguments of Mr.S.B.Vakil and have further submitted as under:

7.1 The petitioner has acquired the cold expansion plant very recently in August 2000 whereas Welspun Ltd was already having the cold expansion plant which is being used for manufacturing the required pipes where the cold expansion is an important part of manufacturing process to give strength so as to carry high pressure gas.

7.2 The petitioner does not have any coating facilities whereas the Welspun Ltd has existing coating facilities next door in its sister concern, i.e. M/s EWPC IPL.

7.3 The petitioner's plant is situated near Indore in M.P. which is away from the place where pipes are required to be supplied. The manufacturing capacity of Welspun is two times that of the petitioner's capacity. The Welspun Ltd has technical collaboration with M/s Eupec Pipe Coatings GMBH, Germany, a world leader in manufacturing such pipes Engineers India Ltd (EIL). which is the most respected Government owned engineering consultant in the field of supply of longitudinal cross country line pipe which involves cold expansion of pipelines. Welspun was incorporated around April 1995 for the purpose of manufacturing 2,00,000 MTs of submerged Arc Welded (SAW) MS pipes i.e. 25000 MT of Spiral AAW pipes and 1,75,000 Longitudinal (SAW) pipes. The Welspun is promoted with the equity participation of and technical collaboration with Intertech GMBH, Germany. The Welspun also has equity participation of Gujarat Industrial Investment Corporation (GIIC).

7.4 The delivery period mentioned in the tender notice was five months from the date of issuance of Letter of Intent whereas the Welspun has agreed to supply all the required quantities of pipes within the period of four months from the date of Letter of Intent and the second respondent has requested the Welspun Ltd to supply the pipes even before the time schedule mentioned in the Letter of Intent and the Welspun Ltd is prepared to comply with such request.

7.5 As regards comparative prices offered by the parties, it is submitted that the rates offered by the petitioner and the rates on which the letter of intent is issued to Welspun Ltd are almost on par inasmuch as the petitioner has excluded the excise duty on the coating price for the purpose of showing lesser rates but excise duty is payable on coating facilities and therefore the Welspun has included the excise duty on coating price while offering rates and therefore the

final picture that emerges is as under:

Item Excise duty Total Price Negotiated price
No. on coating with loading with Welspun Ltd
of excise duty

1. 165.60 4294.08 4292.10
(Rs.4128.48+165.60)

3. 220.64 6697.45 6579.27
(Rs.6476.81+220.64)

It is further submitted that by submitting revised offer the petitioner had given the following justification for revising its offer from Rs.4305.87 to Rs.4128.48.

"The above prices are exclusive of ED of coating charges only. Hence, kindly issue separate work order for job of coating of above pipes"

7.6 The petitioner does not have the experience certificate which is required by the second respondent under the tender. The petitioner is enlisted only for grade upto X-52 and not enlisted for grade X-60 which is requirement of the tender. The petitioner has not manufactured a single meter of pipe required for cross country application which involved Cold expansion process and on the other hand Welspun is having API certificate for manufacturing pipes upto the grade X 60 which is required by the second respondent as per tender.

DISCUSSION:

8.0 ELIGIBILITY OF RESPONDENT NO.3-WELSPUN LTD:

8.1 As far as question of eligibility is concerned, the petitioner's case is that the the Welspun Ltd does not fulfill the following conditions:

"Bid Evaluation Criteria:-

1. Technical criteria for acceptance of bids.

1.1 The pipe manufacturer should have followed licence to use API monogram confirming to API 5L. The licence for use of API monogram

should be atleast three years old. Bidders should submit copy of valid API certificate along with the technical bid. Bids received from non-API manufacturers shall be rejected.

1.2 The manufacturer should have supplied similar pipes (same or higher D.D.) to oil and gas companies of international reputre during the last three years. The bidder should submit list of oil and gas companies to whom they have supplied similar pipes, supply order number, date, order completion date, along with details and contact person name..."

8.2 The petitioner's case is that what the second respondent required as per the terms and conditions is that the bidder was required to have to its credit an experience of supplying similar pipes to oil and gas companies of international reputre over a period of past three years. The Welspun Ltd does not have any experience of supplying such longitudinal pipes but its experience is only in supplying Helical/Spirally Submerged Arc Welded pipes which are low pressure pipes. The Welspun Ltd has started manufacturing longitudinal pipes only from October 1999. Hence, the Welspun Ltd did not have experience of supplying longitudinal pipes to any company over a period of past three years. Hence, merely because the Welspun Ltd was incorporated in 1995 is no ground for holding that the Welspun Ltd. has the requisite licence or experience of manufacturing longitudinal pipes over three years.

8.3 On the other hand it is the case of the second respondent as well as Welspun Ltd that the API monogram is given for manufacturing pipes according to API specifications. This monogram is given for a plant which follows the inspection procedures, documentation and facilities for ensuring quality of the end product. API certificate is not issued for a particular process of manufacturing or type of the line pipes. The petitioners themselves have indicated that Welspun Ltd have been supplying spiral welded pipes as per API monogram for the last three years, hence there is no doubt of experience of the Welspun Ltd when API monogram is not for a particular process of manufacturing of line pipe. The Welspun Ltd has such monogram. The distinction made by the petitioner between longitudinal pipes and helical (spiral) pipes as regards the tenderer's experience has no relevance when Welspun Ltd has valid API monogram. In any case, Welspun Ltd possesses requisite experience to qualify in the tender. Reliance is also placed on the

letter dated 29.9.1999 (annexure "J" on page 136) to the effect that the API licences the use of the API monogram mark under API Specifications 5L and Q1 in the following categories only:

1. Manufactuter of Line Pipe--Plain End
2. Manufactuter of Line Pipe--Threaded and coupled
3. Manufactuter of Line Pipe Couplings
4. Process of Line Pipe--Plain End
5. Process of Line Pipe--Threaded and coupled; or
6. Threader

But, nowhere are the manufacturing methods specified as part of the licensing scope. As long as the pipe is manufactured at a licensed facility under a common quality management system, API does not require additional licences for differing manufacturing processes. It is further submitted that since API licences are not issued for a particular process of manufacturing there is no question of requiring Welspun to have API licence in respect of longitudinal pipes. It is only one process of manufacturing the required pipes for the purpose of laying cross country pipelines.

9. Having heard the learned counsel for the parties, it appears to the Court that when the Welspun Ltd prima facie satisfies the conditions required in the tender notice and according to the technical consultant appointed by the second respondent and also as per the view of the second respondent, Welspun Ltd have the requisite licence and experience of manufacturing the pipes required by the second respondent, the Court would not sit in appeal over the decision of the second respondent to the effect that the Welspun Ltd is eligible for the tender work in question. In this connection, following averments made in the affidavit-in-reply on behalf of Welspun Ltd are also required to be noted:

"The respondent No.3-Welspun was incorporated around April 1995 for the purpose of manufacturing 2,00,000 MTs of submerged Arc Welded (SAW) MS pipes i.e. 25000 MT of Spiral SAW pipes and 1,75,000 Longitudinal (SAW) pipes. The respondent No.3- Welspun is promoted with the equity participation of and technical collaboration with Intertech GMBH, Germany. The Welspun also has equity participation of Gujarat Industrial Investment Corporation (GIIC). Plant of the respondent No.3-Welspun has been set up at village Vadadla/Jolva, Taluka Vagra,

Bharuch-Dahej Road, District Bharuch. Total quantity management is incorporated at each level of not only manufacturing process but also the administrative process. Right from selection of input materials to the final finished product care is taken to see that at each step the exact process and techniques are followed to give a perfect well tested product. The respondent No.3-Welspun's product is ISO 9002 certified by Lloyd Registrar of Quality Assurance (LRQA) and only company in India to be certified by American Petroleum Institute (API) for ISO coupled with API 5L, 5 CT and 2B etc. The Spiral SAW pipe division of the respondent No.3-Welspun has within a short time carved a niche for itself and has been catering to the demands of its esteemed customers since long. The respondent 3 Welspun has supplied hundreds of Kilometers of pipelines for customers in sectors ranging from power plants, refineries, ports and jetties, reputed national oil companies and water supply boards, meeting specific technical conditions including that of cross country pipelines. The respondent No.3-Welspun is only the second company in India to be approved by the Engineers India Ltd (EIL) which is the most respected Government owned engineering consultant in the field of supply of longitudinal cross country pipe which involves cold expansion of pipelines. The respondent No.3-Welspun has received orders from China National Petroleum Company (CNPC) for supply of 42 Kilometers of x 60/ x-70 grade cold expanded line pipes and Lone Star Steel, Houston, USA. The respondent No.3-Welspun is also in the approved vendor list of Enron and certified by Micro Alloying International (Technical Consultant to major oil and gas companies like Enron, Marathon Oil etc of Houston, USA). The respondent No.3-Welspun has also supplied its line pipes to M/s Gas Authority of India Ltd for its "GPC Gandhar" project. To the knowledge and information of the respondent No.3-Welspun the petitioner is not even issued the inquiry letter for the said project as the petitioner did not have the cold expansion facility in its line pipe plant. The technology for Longitudinal SAW Pipelines has been sourced from Mannesmann Demag of Germany, World Leader in the field of international mechanical engineering and plant construction. The equipment for the Spiral SAW Pipelines division has been supplied by Capello

Group of Italy."

In view of the aforesaid material on record, and the opinion of the technical consultant (against whom no allegations are made), which is accepted by the second respondent, that the technical bid made by the Welspun is complete can not be faulted with. Hence the contention urged on behalf of the petitioner that the Welspun is not eligible can not be accepted.

10. The contention that Welspun Ltd is not having experience of manufacturing longitudinal pipes over last three years also can not be accepted for the same reason. Whether the pipes are manufactured with longitudinal process or with spiral process, it is only the different processes for manufacturing pipes and it can not be said that the pipes required by the second respondent are not of similar criteria because the manufacturing process is different. As per the specifications, the supplier is required to supply pipes of diameter in a particular strength. The cold expander process is an essential part of such manufacturing process to give pipes required strength to carry high pressure gas. Even if two views are possible, this Court would not sit in appeal over the decision of the second respondent to consider the experience of Welspun Ltd for supplying such pipes for the last three years.

11. Assuming that the Welspun is not supplying longitudinal pipes since past three years, the action of the second respondent in considering Welspun to be eligible may at the most amount to a deviation from the tender conditions. Even then, as observed by the Apex Court in M/s GJ Fernandez vs. State of Karnataka, AIR 1990 SC 958, the Court would accept such a contention from the the party which was kept out of consideration on such ground or from the party which did not apply in response to the tender notice under the impression that the party is not complying with such condition, but the Courts will not attach much weight to such contention when one of the tenderers objects to the eligibility of another tenderer with an object to have one competitor less.

In view of the above discussion, the first contention urged on behalf of the petitioner fails.

September 7, 2000

COLD EXPANDER

12. The next contention is that the petitioner had all the required facilities for cold expansion as the Cold expansion plant had arrived at the factory of the petitioner on 7.8.2000. It is pertinent to note that at the time of inspection by the technical consultant on 22nd July 2000 the petitioner company did not have the cold expansion plant but the petitioner had stated that the Cold expansion plant was expected and necessary intimation was given to the technical consultant before the technical consultant submitted their report on 10.8.2000. However, the technical consultant's opinion was that even as per the petitioner's expectation, the plant was due for installation, commission and trial runs of cold expansion plant at the end of August 2000; the petitioner has not shown that earlier it had cold expansion plant and has experienced and trained manpower for manufacturing pipes with the cold expansion plant. In this view of the matter the opinion of the technical consultant that the petitioner can not be called for any further consideration at this stage and acceptance of such opinion by the second respondent can not be said to be arbitrary.

COATING FACILITIES

13. As regards coating facilities the petitioner did not have the coating facilities when the technical consultant visited the plant on 22.7.2000 but the petitioner had shown necessary shipping documents to show that the coating plant was being imported by them and that installation and commissioning of coating plant would take some time and commercial production with the coating plant would commence by end October 2000. These facts are not disputed. However, grievance made on behalf of the petitioner is that the representatives of the petitioner had informed the technical consultant that the petitioner was prepared to get coating job done outside by an established agency within India. The technical consultant did mention that the petitioner had shown its willingness to carry out the coating through external agency but they did not name the said agency which was the requirement as per the second respondent's letter dated 20.6.2000. The technical consultant further opined that the issue was discussed with the petitioner but they did not disclose the name of any outside agency for coating. This assertion made by the technical consultant is not seriously disputed by the petitioner. The only

explanation offered by them is that in view of cut-throat competition the petitioner did not want to disclose the name of the company where the coating work would be done by the petitioner. The petitioner has placed on record one letter of one PSL Holdings Ltd to show that the said company was willing to carry out coating of pipelines. There is some dispute raised on behalf of the second respondent with reference to the dimensions of the pipelines required by the second respondent. However, the Court is not inclined to go into the said question because even if the petitioner did not want to come out with the details about the price schedule with the pipe coating, the petitioner could have, at least, pointed out the name of the company which was to carry out the coating work on behalf of the petitioner or in respect of the pipelines to be supplied by the petitioner. Similarly, letter of Saw Pipes Ltd is produced on page 181 wherein the said company has shown their willingness to undertake the coating work at their plant located at Kosi-Kalan, District Mathura. The said letter is dated July 22 2000. Even if the petitioner wanted to keep the particulars of coating as a trade secret, nothing prevented the petitioner from disclosing the name of Saw Pipes Ltd(Jindal Group) or even to show the aforesaid letter dated 22.7.2000 to the Technical Consultant at the time of their visit because the petitioner had written a letter to the Technical consultant on 1.8.2000 as well as on 7.8.2000.

COMPARATIVE PRICES

14. The next contention urged on behalf of the petitioner is that even if the petitioner is likely to take more time on account of their cold expansion plant being installed in August 2000 and the petitioner is required to get coating facilities outside, since price difference between the rates offered by the petitioner and the revised offer by the Welspun Ltd. is substantial, the second respondent ought not to have ignored the said price difference. In this connection the petitioner has submitted that the revised price offered by the petitioner as well as Welspun Ltd for item Nos 1.1 and 1.3 are as under:-

REVISED RATES

Item Petitioner Respondent No.3

1.1 4128.48 4292.10

1.3 6476.81 6579.27

15. The submission of the learned counsel for the respondents is that the reduction in the price rate offered by the petitioner was only on account of exclusion of Excise duty on coating which came to Rs.160.60 ps on the coating price of Rs.1035/-. It is submitted that as per the decision of the Apex Court in 2000(67) ECC 601(SC) in Siddhartha Tubes Ltd vs Collector of Central Excise when the assessable value is to be calculated, the element of cost of galvanisation must form a part thereof and that mere fact that the process of galvanisation is carried on in another shed can make no difference. It is submitted that once this Excise duty component is added to the revised price offered by the petitioner, said revised price comes to Rs.4294.08ps as against which letter of intent is issued to Welspun for Rs.4292.10 ps.regarding item 1.1. Similarly it is submitte

duty of Rs.220.64 at the rate of 16% on the coating price of Rs.1379 is added to the revised price of Rs.6476.81ps offered by the petitioner, the same comes to Rs.6697.45ps against which the letter of intent is issued to the Welspun Ltd for Rs.6579.27ps. It is submitted that on the basis of above figures the letter of intent is issued to the Welspun Ltd in respect of items 1.1 and 1.3 and the rates offered by Welspun are lower than that offered by the petitioner. According to the second respondent, the rates work out as under:

Item No.	Revised rates of the petitioner to per Meter	Total Amount	Rates under LOI issued to	Total Amount
	Rs. per Meter	Rs.		
1.1	Rs.4128.48 Quoted rate	Rs.4292.10		
	Rs.0165.60 Excise on Coating	Inclusive of	Excise on	
	----- Coating			
	Rs.4294.08 Effective price	2,14,50,400		2,14,60,500

1.3	Rs.6476.81 Quoted rate	Rs.6579.27	
	Rs.0220.64 Excise on	Inclusive of	
	Coating	Excise on	
	-----	Coating	
	Rs.6697.45 Effective		
	price	21,76,67,125	21,38,26,275

Total Amount	23,91,37,525	23,52,86,775
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16. As against the above submission, Mr.Oza for the petitioner has vehemently submitted that the petitioner had made it clear that the Excise duty is to be excluded and if at all the excise duty is leviable it would be for the petitioner to bear the said burden and the second respondent ought to have considered the revised price (excluding excise duty) offered by the petitioner which was substantially lower than the rates offered by the Welspun Ltd and ought to have made a saving of Rs.54.71 lacs. As per the calculations supplied by the learned counsel for the second respondent on the basis of the petitioner's rates without excise duty, the amounts work out as under :-

For item No. 1.1 Rs. 2,06,42,000
+ for item No. 3.1 Rs. 21,04,96,325

Rs. 23,11,38,725

17. Mr.Vakil for the second respondent has submitted that the second respondent had already entered into agreement with the GACL for supplying natural gas through pipeline running into 43 KMs and the delay of every day beyond the scheduled time limit would have resulted into liability to pay liquidated damages of Rs.10 lacs per day. In view of the uncertainties on account of the

petitioner not having coating facilities and his own coating facilities were to become operational for commercial purposes only after end October 2000 and in view of the fact that the petitioner's cold expander which had arrived only on 7.8.2000, but there was nothing to show that it had the skilled manpower to operate the same, it would be risky for the second respondent to award the contract to the petitioner merely in order to save Rs.54 lacs in the context of the tender requirements. Even if the contract were to be awarded to the petitioner for item Nos 1.1 and 1.3 (for which the letter of intent is issued to the Welspun Ltd), the petitioner would have charged Rs.23,11,38,725 (Rs.23.11 crores approximately). As against that Welspun Ltd is going to charge Rs.23,52,86,775/- (Rs.23.53 crores approximately) under the impugned letter of intent. It is submitted that when the contract was for item Nos 1.1 and 1.3 costing between 23 crores and 24 crores of rupees, in any case, saving of about Rs.41.48 lacs attended by the uncertainties about the petitioner's commencing their manufacturing of cold expanded pipes after August 2000 and their coating process starting after the end of October 2000 or earlier at the hands of unknown source would be taking too much of a risk which the second respondent would not like to take when the second respondent is already committed to supply the natural gas to the GSCL within time bound programme for which the second respondent is not only required to purchase the pipelines, but the pipelines are required to be laid over a length of 43.5 KMs and everything has to be arranged in a technically prescribed manner so that the supply of natural gas can commence from August 2000. It is submitted that it is for this reason that as per the letter of intent scheduled time delivery for Welspun Ltd to supply the pipelines to the second respondent is only four months from the date of issuance of letter of intent i.e. by 17.12.2000 because laying the pipeline covering a distance of 43.5 KMs will be a long-drawn process which has to be completed by June 2001.

18. It is further submitted by Mr.Vakil that the second respondent is going to undertake the projects for laying pipelines for supplying natural gas to various areas in the State and that as per the present estimate such pipelines would be for total length of 2500 KMs and the quantity to be taken under the impugned letter of intent issued is for a length of only 43.5 KMs. It is, therefore, submitted that in future when the second respondent will invite the tenders the petitioner will certainly get an opportunity to offer the competitive bids and the same would be duly considered at the time

when the petitioner will have the facilities of cold expander and coating facilities operational.

19. Having regard to the aforesaid facts it can not be said that irrelevant factors are taken into consideration. It is not possible to stigmatize the action of the second respondent in issuing impugned letter of intent dated 17.8.2000 to Welspun Ltd as arbitrary and therefore violative of Article 14 of the Constitution of India.

20. Even while negating the challenge raised by the petitioner, this Court can not help observing that the stage at which the second respondent excluded the petitioner from consideration did in all probabilities cause some loss to the second respondent when there were only two serious contenders in the field. Even if the technical consultant was of the view that as on 10.8.2000 the petitioner's case did not require consideration in view of uncertainties about its coating facilities and the recent installation of cold expander at the petitioner's factory, without giving any final finding that the petitioner was ineligible and in fact by adding a line as pointed out in the letter, dated 19.7.2000 (Annexure "C") "it may however be noted that mere opening of the price bid should not be considered as our full and final acceptance of technical aspects of the bid and/or that deviation has been accepted", similar noting to the effect that " calling the petitioner for negotiations should not be considered as the second respondent's acceptance of technical aspects of the bid" the second respondent could have kept the competition open and such a course of action could have led to reduction in the rates offered by Welspun Ltd. Instead, the Board of Directors of the second respondent passed a resolution dated 11.8.2000 excluding the petitioner from consideration for item Nos 1.1 and 1.3 for inviting only Welspun Ltd for negotiations. This approach, for all practical purposes ensured that in the absence of any competition, the Welspun would not reduce its rates substantially. It was open to the second respondent to keep the competition alive and take final decision after receiving final offer of Welspun Ltd and the petitioner and at that stage, even if the petitioner's offer was lowest it was open to the second respondent to issue letter of intent in favour of Welspun Ltd on the ground that the petitioner was not having requisite facilities for coating and cold expansion.

21. When the aforesaid aspect of the matter was brought to the notice of the learned counsel for the

second respondent, it was submitted that if the petitioner was called for negotiations inspite of report dated 10.8.2000 of the technical consultants it could have been argued by and on behalf of the petitioner that the second respondent had waived the so called technical aspect of the bid and/or deviation in the offer of the petitioner and therefore the second respondent would be bound to consider the petitioner as eligible.

22. The aforesaid submission is misconceived. As already observed earlier, just as a caveat was used by the second respondent while issuing letter dated 19.7.2000 (Annexure "C") the same caveat could have been used while calling the petitioner for negotiations. It is the settled legal position that the authority is not bound to accept the lowest offer while purchasing the materials because the quality of material, experience of the manufacturer, the time schedule of delivery etc are important considerations which can play a vital role in taking final decision. However, since imprudence is not necessarily arbitrariness and since the material on record does not warrant drawing any other inference, this Court would not like to make any further observations, but does make it clear that the dismissal of the petition is not to be taken as an expression of the view that the Board of Directors of the second respondent had acted in the best interest of the second respondent or in a business like manner.

23. Subject to aforesaid observations in paras 20 and 22, this petition is dismissed. Rule is discharged. Ad interim relief granted earlier stands vacated. In the facts and circumstances of the case, however, there shall be no order as to costs.

24. At this stage the learned counsel for the petitioner prays that the ad interim relief granted earlier be continued for some time in order to enable the petitioner to have further recourse in accordance with law. The only ad-interim order which was passed earlier was to the effect that whatever steps the respondents take pursuant to the impugned decision shall be subject to the result of this petition. Hence, no orders are required to be passed at this stage.

25. This Court would also like to observe that as per the calculations made by the second respondent company as well as respondent No.3-Welspun Ltd they have taken into account the liability of respondent No.3-Welspun to pay the Excise duty on coating, as per the decision dated

3.11.1995 in the matter of Sidhartha Tubes Ltd vs Collector of Central Excise reported in 2000(67) ECC 601(SC). Hence, a copy of this judgment shall be sent to the Collector, Central Excise at Bharuch/Ankleshwar.

6/7-9-2000 (M.S.SHAH, J)